



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 984

[Doc. No. AMS-SC-16-0053; SC-16-984-1 PR]

**Walnuts Grown in California; Proposed Amendment to
Marketing Order 984 and Referendum Order**

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed amendment and referendum order.

SUMMARY: This rule proposes one amendment to Marketing Order No. 984 (order), which regulates the handling of walnuts grown in California, and provides growers with the opportunity to vote in a referendum to determine if they favor the change. This amendment was proposed by the California Walnut Board (Board), which is responsible for the local administration of the order and is comprised of walnut growers and handlers operating within the production area. The amendment would authorize the Board to borrow from a commercial lending institution to fund operations and marketing/research expenses. This proposed amendment is intended to reflect a customary business practice that will provide greater flexibility to the Board while increasing its effectiveness.

DATES: The referendum will be conducted from August 7, 2017, through August 18, 2017. The representative period

for the purpose of the referendum is September 1, 2015, through August 31, 2016.

FOR FURTHER INFORMATION CONTACT: Geronimo Quinones, Marketing Specialist, or Julie Santoboni, Rulemaking Branch Chief, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, Stop 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Geronimo.Quinones@ams.usda.gov or Julie.Santoboni@ams.usda.gov.

Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Richard.Lower@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This proposal is issued under Marketing Order No. 984, as amended (7 CFR part 984), regulating the handling of walnuts grown in California, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 12866, 13563, and 13175.

This proposal has been reviewed under Executive Order 12988, Civil Justice Reform. This proposal is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15) (A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

Section 1504 of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) (Pub. L. 110-246) amended section 8c(17) of the Act, which in turn required the addition of

supplemental rules of practice to 7 CFR part 900 (73 FR 49307; August 21, 2008). The additional supplemental rules of practice authorize the use of informal rulemaking (5 U.S.C. 553) to amend Federal fruit, vegetable, and nut marketing agreements and orders. USDA may use informal rulemaking to amend marketing orders based on the nature and complexity of the proposed amendment, the potential regulatory and economic impacts on affected entities, and any other relevant matters.

AMS has considered these factors and has determined that the amendment proposal is not unduly complex and the nature of the proposed amendment is appropriate for utilizing the informal rulemaking process to amend the order.

The proposed amendment was unanimously recommended by the Board following deliberations at a public meeting held on February 19, 2016.

A proposed rule soliciting comments on the proposed amendment was issued on September 12, 2016, and published in the **Federal Register** on September 16, 2016 (81 FR 63721). Two comments were received, both in support of the amendment. AMS will conduct a grower referendum to determine support for the proposed amendment. If

appropriate, a final rule will then be issued to effectuate the amendment favored by growers in the referendum.

The Board's proposed amendment would amend the order by authorizing the Board to borrow from a commercial lending institution during times of cash shortage to help ensure continuity of operations.

Proposal - Borrowing from a Commercial Lending Institution

Section 984.69 of the order, Assessments, authorizes the Board to collect assessments from handlers to administer the program.

This proposal would provide the Board with authority to borrow from a commercial lending institution during times of cash shortages. In the past, the Board has utilized reserve funds collected through handler assessments to help finance the advertising/marketing program. However, due to the increased size of the domestic advertising program, relying on reserve funds as a means to meet obligations could make the program unsustainable in the long term. History shows the most costly part of the program runs during the first six months of the marketing year, and those expenditures must be paid by mid-year. Since the payments must be made before all assessment fees are invoiced and collected, a cash shortage may occur during the year. Authorizing the Board to borrow

from a commercial lending institution would help manage and sustain the program during times of low income while also ensuring continuity of operations.

Therefore, for the reasons stated above, it is proposed that § 984.69, Assessments, be amended by adding a new paragraph that would provide the Board with authority to borrow from a commercial lending institution when no other funding is available.

Executive Orders 12866 and 13771, and Regulatory Flexibility Analysis

This rule does not meet the definition of a significant regulatory action contained in section 3(f) of Executive Order 12866, and is not subject to review by the Office of Management and Budget (OMB). Additionally, because this rule does not meet the definition of a significant regulatory action it does not trigger the requirements contained in Executive Order 13771. See OMB's Memorandum titled "Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017 titled 'Reducing Regulation and Controlling Regulatory Costs'" (February 2, 2017). Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities.

Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 5,700 growers of California walnuts in the production area and approximately 90 handlers subject to regulation under the marketing order. The Small Business Administration defines small agricultural growers as those having annual receipts of less than \$750,000 and defines small agricultural service firms as those whose annual receipts are less than \$7,500,000 (13 CFR 121.201).

According to USDA's National Agricultural Statistics Service's (NASS's) 2012 Census of Agriculture, approximately 86 percent of California's walnut farms were smaller than 100 acres. Further, NASS reports that the average yield for 2014 was 1.97 tons per acre, and the average price received for 2014 was \$3,230 per ton.

A 100-acre farm with an average yield of 1.97 tons per acre would therefore have been expected to produce about 197 tons of walnuts during 2014-15 marketing year. At \$3,230 per ton, that farm's production would have had an approximate value of \$636,310. Since Census of Agriculture information indicates that the majority of California's walnut farms are smaller than 100 acres, it could be concluded that the majority of the growers had receipts of less than \$636,310 in 2014-15, which is well below the SBA threshold of \$750,000. Thus, the majority of California's walnut growers would be considered small growers according to SBA's definition.

According to information supplied by the Board, approximately two-thirds of California's walnut handlers shipped merchantable walnuts valued under \$7,500,000 during the 2014-15 marketing year and would, therefore, be considered small handlers according to the SBA definition.

The amendment proposed by the Board would authorize the Board to borrow from commercial lending institutions. This would help to ensure continuity in operations.

The Board reviewed and identified the most costly portion of its domestic advertising program. That portion of the program operates during the first six months of the Board's marketing year and costs must be paid by mid-year.

Since assessment revenues are collected throughout the marketing year, not enough is on hand when these large payments are due. In the past, the Board has used reserve funds to help pay for marketing and advertising expenses. However, due to the increased size of the advertising program, the Board cannot rely on reserve funds to cover the costs. Based on this fact, the Board believes the program could become unsustainable in the long term.

While this action could result in a temporary increase in handler assessment costs, these increases would be small and uniform on all handlers and proportional to the size of their businesses. These costs are expected to be offset by the benefits derived from a sustained marketing and advertising program. Additionally, these costs would help to ensure that the Board has sufficient funds to meet its financial obligations. Such stability is expected to allow the Board to conduct a program that would benefit all entities, regardless of size. California walnut growers should see an improved business environment and a more sustainable business model because of the improved business efficiency.

Alternatives were considered to this proposal, including making no change at this time. However, the

Board believes it would be beneficial to have the means and funds necessary to effectively administer the program.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <http://www.ams.usda.gov/rules-regulations/moa/small-businesses>. Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581-0178, "Vegetable and Specialty Crops." No changes are necessary in those requirements as a result of this action. Should any changes become necessary, they would be submitted to OMB for approval.

This proposed amendment would impose no additional reporting or recordkeeping requirements on either small or large California walnut handlers.

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. In addition, USDA has not identified any

relevant Federal rules that duplicate, overlap, or conflict with this rule.

AMS is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

The Board's meeting was widely publicized throughout the California walnut production area. All interested persons were invited to attend the meeting and encouraged to participate in Board deliberations on this issue. Like all Board meetings, the February 19, 2016, meeting was public, and all entities, both large and small, were encouraged to express their views on the proposal.

A proposed rule concerning this action was published in the **Federal Register** on September 16, 2016 (81 FR 63721). Copies of the rule were mailed or sent via facsimile to all Board members. Finally, the rule was made available through the internet by USDA and the Office of the Federal Register. A 60-day comment period ending November 16, 2016, was provided to allow interested persons to respond to the proposal.

Two comments were received in support of the proposal. Therefore, no changes have been made to the proposed amendment as a result of the comments received.

Findings and Conclusions

The findings and conclusions and general findings and determinations included in the proposed rule set forth in the September 16, 2016, issue of the **Federal Register** are hereby approved and adopted.

Marketing Order

Annexed hereto and made a part hereof is the document entitled "Order Amending the Order Regulating the Handling of Walnuts Grown in California." This document has been decided upon as the detailed and appropriate means of effectuating the foregoing findings and conclusions. It is hereby ordered, that this entire rule be published in the **Federal Register**.

Referendum Order

It is hereby directed that a referendum be conducted in accordance with the procedure for the conduct of referenda (7 CFR part 900.400-407) to determine whether the annexed order amending the order regulating the handling of Walnuts Grown in California is approved by growers, as

defined under the terms of the order, who during a representative period were engaged in the production of walnuts in the production area.

The representative period for the conduct of such referendum is hereby determined to be September 1, 2015, through August 31, 2016.

The agents of the Secretary to conduct such referendum are designated to be Terry Vawter and Jeffrey Smutny, California Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (559) 487-5901, or E-mail: Terry.Vawter@ams.usda.gov or Jeffrey.Smutny@ams.usda.gov, respectively.

List of Subjects in 7 CFR Part 984

Walnuts, Marketing agreements, Reporting and recordkeeping requirements.

Dated: May 19, 2017

Bruce Summers
Acting Administrator
Agricultural Marketing Service

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**Order Amending the Order Regulating the Handling of Walnuts
Grown in California**¹

Findings and Determinations

The findings hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of the marketing order; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

1. The marketing order, as amended, and as hereby proposed to be further amended, and all of the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

2. The marketing order, as amended, and as hereby proposed to be further amended, regulates the handling of walnuts grown in California in the same manner as, and are applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing order;

3. The marketing order, as amended, and as hereby

¹This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

proposed to be further amended, is limited in application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

4. The marketing order, as amended, and as hereby proposed to be further amended, prescribe, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of walnuts produced in the production area; and

5. All handling of walnuts produced in the production area as defined in the marketing order is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

Order Relative to Handling

It is therefore ordered, that on and after the effective date hereof, all handling of walnuts grown in California shall be in conformity to, and in compliance with, the terms and conditions of the said order as hereby proposed to be amended as follows:

The provisions of the proposed marketing order amending the order contained in the proposed rule issued by

the Administrator on September 12, 2016, and published in the **Federal Register** (81 FR 63721) on September 16, 2016, will be and are the terms and provisions of this order amending the order and are set forth in full herein.

PART 984 - WALNUTS GROWN IN CALIFORNIA

1. The authority citation for 7 CFR part 984 continues to read as follows:

Authority: 7 U.S.C. 601-674.

2. Amend 984.69 by redesignating paragraph (d) as (e) and adding a new paragraph (d) to read as follows:

§ 984.69 Assessments.

* * * * *

(d) To provide funds for the administration of the provisions of this part during the part of a fiscal period when neither sufficient operating reserve funds nor sufficient revenue from assessments on the current season's certifications are available, the Board may accept payment of assessments in advance or may borrow money from a commercial lending institution for such purposes.

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